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Representative Cathy McMorris
Chairman, NEPA Task Force
House of Representatives Committee on Resources
1324 Longworth HOB
Washington, DC 20515

RE: Comments to the Draft Report Recommendations of the House of Representatives Committee on Resources-NEPA Task Force

Dear Representative McMorris:

Please find enclosed BP America Inc.'s comments to the Draft Report Recommendations compiled by the NEPA Task Force. BP is one of the largest federal oil and gas leaseholders in the Rocky Mountains and has been an active participant in numerous NEPA analyses ranging from nominal Environmental Assessments (EAs) to project-level Environmental Impact Statements (EIS) throughout the Rocky Mountain region. We appreciate your efforts to assess the effectiveness of NEPA and our opportunity to provide testimony to your Committee during one of the field hearings.

As we've testified, BP believes the NEPA statutory framework is sound. Subsequent fine-tuning found in the Council of Environmental Quality (CEQ) regulations from the late 1970s was also beneficial, but that process has been seldom. Instead of making wholesale changes to NEPA itself, as we told the Committee, we believe it may be more advantageous to focus on reviewing and revising the Council of Environmental Quality (CEQ) regulations.

It was clear from the testimony the Committee received during its field hearings that the current system is mired in procedural and legal obstacles which must be addressed to assure that the objectives of NEPA are met in a timely and effective manner. With regard to oil and gas development requiring federal action, it is critical that the process be improved to help meet the increasing energy demands of the country. The recommendations the Committee is proposing are a step in the right direction. While we agree with a number of

the recommendations, we believe there are others that require some additional fine-tuning and careful consideration. Provided below is a format that is designed to present our comments to the recommendations of the Committee. We have included the specific language of the Committee along with a "BP Comment" in italics.

Group 1 - Addressing Delays in the process

Recommendation 1.1: Amend NEPA to define "major federal action." NEPA would be enhanced to create a new definition of "major federal action" that would only include new and continuing projects that would require substantial planning, time, resources, or expenditures.
BP Comment: This definition is far too open-ended and could trigger EISs for projects that would otherwise fall within the scope of an Environmental Assessment or categorical exclusion. Also, there are no definitions as to what constitutes substantial planning, time, resources or expenditures. The current definition and the criteria of a "major federal action" can be found in the CEQ regulations at 40 CFR 1508.18. This definition and the associated criteria have worked well over the years and there is no need to make a legislative change.

Recommendation 1.2: Amend NEPA to add mandatory timelines for the completion of NEPA documents. A provision would be added to NEPA that would limit to 18 months the time for completing an Environmental Impact Statement (EIS). The time to complete an EA will be capped at 9 months. Analyses not concluded by these timeframes will be considered completed. There will obviously be situations where the timeframes cannot be met, but those should be the exception and not the rule. Before the time expires, an agency would have to receive a written determination from CEQ that the timeframes will not be met. In this determination, CEQ may extend the time to complete the documents, but not longer than 6 and 3 months respectively.
BP Comment: BP supports a time frame limitation for EISs and EAs, but as presented in BP's testimony, the extended time frames to complete NEPA analyses are varied. It is difficult to impose time-specific time frames without dealing with the multitude of issues that contribute to this dilemma. BP testified that EAs and EISs should consider eliminating or combining portions that add little value to impact determinations. For example, the "Affected Environment" describes current conditions. While this information is useful, it is often voluminous and does not need to go into the detail currently contained in NEPA documents. Instead, these sections could be combined and summarized within the Environmental Consequences and Cumulative Impact portion of a NEPA document, significantly reducing the volume of the document. Another BP recommendation was to require that Agencies use the best scientific evidence AVAILABLE to conduct an analysis. Agencies should not need to generate new information to "bullet proof" their analyses in an attempt to avoid litigation/protests. Our experience is that generating such new information has done nothing to prevent litigation and it adds significant time and costs to the preparation of a NEPA document. Finally, when preparing EAs, efforts should be made to avoid increasing the level of analysis to that required for an EIS. EAs should be written to determine whether an EIS is warranted, not just simply as an abbreviated version of one.

EAs should address selected resource concerns and disclose mitigation measures in a brief and concise manner.

Since our testimony, we have embarked on other efforts to improve the process of preparing NEPA documentation in an effort to expedite the time frames when third party contractors are used. Among these enhancements is better coordination between the contractor, the project proponent and the agency at an early stage of the process. This early project planning allows each party to be aware of what the expectations are relative to information, resource data, time frames, procedures and communications efforts, to name a few. While we still support time frame limitations, the other contributing factors to delay must be dealt with to make this recommendation a realistic expectation that can be achieved. If this was to occur, we encourage that the change be made to the CEQ regulations at 40 CFR 1501.8 "Time limits" in lieu of a statutory change to NEPA.

Recommendation 1.3: Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EISs). In order to encourage the appropriate use of CEs and EAs the statute would be amended to provide a clear differentiation between the requirements for EAs and EISs. For example, in order to promote the use of the correct process, NEPA will be amended to state that temporary activities or other activities where the environmental impacts are clearly minimal are to be evaluated under a CE unless the agency has compelling evidence to utilize another process.
BP Comment: We support this recommendation; however, it would more useful to include this recommendation in the CEQ regulations instead of amending the statute. This would allow more flexibility in adding activities later that should be subject to CEs and EAs as opposed to re-opening the statute. In BP's testimony we recommended the following CEs:

- *Issuance and modifications of regulations, orders, standards, notices to lessees and operators, and field rules, where the impacts are limited to administrative, economic or technological effects and the environmental impacts are minimal.*
- *Establishment of terms and conditions in Notices of Intent to conduct geophysical exploration of oil and gas pursuant to 43 CFR 3150 where road building and long term (greater than one year) surface damage is not expected.*
- *Approval of an Application for Permit To Drill (APD) in the following circumstances: 1) re-entry or modification of an existing well bore, 2) approval of a new well drilled from an existing well pad, and 3) approval of an in-field development well where multiple prior environmental assessments (EAs) have found no significant impacts and the well is within the scope of an existing Reasonable Development Scenario (RFD).*
- *Approval of on-lease linear facilities (e.g., when placed in existing corridors or areas of prior disturbance).*
- *Exceptions to lease terms or conditions of approval that do not result in or involve significant new surface disturbance.*

We believe these types of activities represent a good initial list to begin incorporating as CEs.

Recommendation 1.4: Amend NEPA to address supplemental NEPA documents. A provision would be added to NEPA to codify criteria for the use of supplemental NEPA documentation. This provision would limit the supplemental documentation unless there is a showing that: 1) an agency has made substantial changes in the proposed actions that are relevant to environmental concerns; and 2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. This language is taken from 40 CFR 1502.9(c)(1)(i) and (ii).
BP Comment: We support this recommendation. However, legislation to accomplish this recommendation is probably not necessary given the direction is already provided in the CEQ regulations as noted in the recommendation.

Group 2 - Enhancing Public Participation
Recommendation 2.1: Direct CEQ to prepare regulations giving weight to localized comments. When evaluating the environmental impacts of a particular major federal action, the issues and concerns raised by local interests should be weighted more than comments from outside groups and individuals who are not directly affected by that proposal.
BP Comment: This recommendation is difficult to endorse because it is not known what would be defined as "localized comments" or "local interests" affected by the proposal. Oil and gas project proponents, for example, may not be considered "local" because of the distance from their headquarters to the proposal, but would that justify placing less emphasis on those comments? Our perception of this recommendation is that attempting to define what would be a "local interest" would be complicated. Currently each comment receives equal consideration and is dealt with on its own merits. While the intent of the recommendation is good, it would be difficult to administer and place the agencies in an awkward position. For these reasons, we do not support this recommendation.

Recommendation 2.2: Amend NEPA to codify the EIS page limits set forth in 40 CFR 1502.7. A provision would be added to NEPA to codify the concept that an EIS shall normally be less than 150 pages with a maximum of 300 pages for complex projects.
BP Comment: BP supports this recommendation. As presented in our comments on Recommendation 1.2, there are opportunities to reduce the volume of NEPA documents.

Group 3 – Better Involvement for State, Local and Tribal Stakeholders
Recommendation 3.1: Amend NEPA to grant tribal, state and local stakeholders cooperating agency status. NEPA would be enhanced to require that any tribal, state, local, or other political subdivision that requests cooperating agency status will have that request granted, barring clear and convincing evidence that the request should be denied. Such status would neither enlarge nor diminish the decision making authority for either federal or non-federal entities. The definition would include the term "political subdivisions" to capture the large number of political subdivisions that provide vital services to the public but are generally ignored in the planning for NEPA.

BP Comment: It is recommended the term "local stakeholders" in the first line be changed to read "legally recognized governmental entities". The term "local stakeholders" is far too broad and could be interpreted more broadly to include non-governmental organizations which is clearly not the intent with the additional discussion provided with this recommendation. Further, "political subdivisions" should be changed to "legally recognized governmental entities". In addition, the CEQ regulations at 40 CFR 1508.5 provide criteria regarding the type of entity would be included as a cooperating agency. BP supports this recommendation but suggests that existing CEQ language could be modified to accommodate the change.

Recommendation 3.2: Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements. CEQ would be directed to prepare regulations that would, in cases where state environmental reviews are functionally equivalent to NEPA requirements, allow these requirements to satisfy commensurate NEPA requirements.
BP Comment: We support this recommendation. There is no need to duplicate the state-level analysis which is equivalent to that being performed by federal agencies.

Group 4 - Addressing Litigation Issues
Recommendation 4.1: Amend NEPA to create a citizen suit provision. In order to address the multitude of issues associated NEPA litigation in an orderly manner the statute would be amended to create a citizen suit provision. This provision would clarify the standards and procedures for judicial review of NEPA actions. If implemented, the citizen suit provision would:
• Require appellants to demonstrate that the evaluation was not conducted using the best available information and science.
BP Comment: We concur with this recommendation.
• Clarify that parties must be involved throughout the process in order to have standing in an appeal.
BP Comment: This recommendation has been generally applied based upon court decisions, but having it clearly stated would provide additional emphasis. BP supports this recommendation.
• Prohibit a federal agency – or the Department of Justice acting on its behalf – to enter into lawsuit settlement agreements that forbid or severely limit activities for businesses that were not part of the initial lawsuit. Additionally, any lawsuit settlement discussions involving NEPA review between a plaintiff and defendant federal agency should include the business and individuals that are affected by the settlement is sustained.
BP Comment: The first part of the recommendation regarding prohibiting the Department of Justice from entering into lawsuit settlement agreements that forbid or severely limit activities for businesses and were not part of the initial lawsuit could complicate and delay settlement agreements. If businesses have not taken the initiative to intervene on a protest or legal action that could affect their interests, bringing those issues in later could prove very time consuming. Additionally, criteria to identify businesses that were not part of the initial lawsuit that later would be included in settlement discussions would need to be

developed While this recommendation may have good intentions, it requires more specificity on how it would be implemented before BP could support it.

• Establish clear guidelines on who has standing to challenge an agency decision. These guidelines should take into account factors such as the challenger's relationship to the proposed federal action, the extent to which the challenger is directly impacted by the action, and whether the challenger was engaged in the NEPA process prior to filing the challenge.

BP Comment: We concur with this recommendation.

• Establish a reasonable time period for filing the challenge. Challenges should be allowed to be filed within 180 days of notice of a final decision on the federal action;

BP Comment: While we support placing a time frame limit on filing challenges, 180 days is too long. In virtually every case, project proponents will have commenced authorized activities within 180 days following issuance of a Record of Decision (ROD), Finding Of No Significant Impact (FONSI), or in the case of a CE being applied. If a challenge was subsequently filed toward the end of the 180 days and a temporary restraining order was issued, shutting down or suspending activities would result in substantial harm to the project proponents. The time frame for filing a challenge should be limited to 30 days.

Recommendation 4.2: Amend NEPA to add a requirement that agencies "pre clear" projects. CEQ would become a clearinghouse for monitoring court decisions that affect procedural aspects of preparing NEPA documents. If a judicial proceeding or agency administrative decision mandates certain requirements, CEQ should be charged with the responsibility of analyzing its effects and advising appropriate federal agencies of its applicability.

BP Comment: We have concerns with the phrase "pre-clear projects" in the underlined portion of the above recommendation. Our testimony to the Committee stated the following: "CEQ should be established as a clearinghouse for monitoring court decisions that affect procedural aspects of preparing NEPA documents. If a judicial proceeding or agency administrative decision mandates certain requirements, CEQ should be charged with the responsibility of analyzing its effects and advising appropriate federal agencies of its applicability." The phrase "pre clear projects" is inconsistent with the language following the underlined sentence. Consequently, to avoid confusion, the first sentence of the Committee's Recommendation 4.2 should be simply deleted. The recommendation would read "Amend NEPA to make CEQ a clearinghouse…." If this revision is incorporated, BP would support this recommendation.

BP also presented suggestions relative to litigation that are not reflected in the recommendations of the Committee. These included a suggestion that appellants be required to post bonds to cover the cost of legal fees and administrative costs of agency employees who must respond to litigation as part of the process. The bond, or a prorated portion of it, would be forfeited if the appellants are unsuccessful. BP believes this suggestion should be considered further by the Committee to deal with the litigation issues.

Group 5- Clarifying Alternatives Analysis

Recommendation 5.1: Amend NEPA to require that "reasonable alternatives"

analyzed in NEPA documents be limited to those which are economically and technically feasible. A provision would be created to state that alternatives would not have to be considered unless it was supported by feasibility and engineering studies, and be capable of being implemented after taking into account: (a) cost, (b) existing technologies, and (c) socioeconomic consequences (e.g., loss of jobs and overall impact on a community).
BP Comment: We support this recommendation. It is critically important that only technically and economically feasible alternatives be considered. This will focus the analysis on achievable alternatives and prevent wasting valuable time and financial resources.

Recommendation 5.2: Amend NEPA to clarify that the alternative analysis must include consideration of the environmental impact of not taking an action on any proposed project. A provision would be created that require an extensive discussion of the "no action alternative" as opposed the current directive in 40 CFR 1502.14 which suggests this alternative merely be included in the list of alternatives. An agency would be required to reject this alternative if on balance the impacts of not undertaking a project or decision would outweigh the impacts of executing the project or decision.
BP Comment: This recommendation requires additional clarification. It is not clear if "extensive discussion" of the no action alternative is suggesting that a detailed analysis equivalent to other alternatives be conducted in the NEPA document or if a more concise narrative would suffice. It should be noted that making a conclusion to reject the alternative -- if on balance the impacts of not undertaking a project or decision would outweigh the impacts of executing the project -- is difficult without conducting a complete analysis. This can add time, complexity and costs to a NEPA analysis. BP suggests the recommendation be modified to read: "A provision would be created that requires a discussion of the "no action alternative" to a degree that would allow a decision whether it should receive the same level of analysis as other alternatives identified in the NEPA analysis."

Recommendation 5.3: Direct CEQ to promulgate regulations to make mitigation proposals mandatory. CEQ would be directed to craft regulations that require agencies to include with any mitigation proposal a binding commitment to proceed with the mitigation. This guarantee would not be required if (1) the mitigation is made an integral part of the proposed action, (2) it is described in sufficient detail to permit reasonable assessment of future effectiveness, and (3) the agency formally commits to its implementation in the Record of Decision, and has dedicated sufficient resources to implement the mitigation. Where a private applicant is involved, the mitigation requirement should be made a legally enforceable condition of the license or permit.
BP Comment: Our experience indicates what is being proposed with this recommendation is already being accomplished. NEPA analyses typically incorporate mitigation proposals as part of the analysis to gauge their effectiveness. Further, individual agencies in many cases have established criteria as to what type and level of mitigation is appropriate. If mitigation is applied, either by the agency or voluntarily by the project proponent, it is

incorporated into the NEPA decision documents and operating permits. Therefore, we do not see the need to incorporate this recommendation in the CEQ regulations.

Group 6 – Better Federal Agency Coordination

Recommendation 6.1: Direct CEQ to promulgate regulations to encourage more consultation with stakeholders. As pointed out in testimony, the existence of a constructive dialogue among the stakeholders in the NEPA process and ensuring the validity of data or to acquire new information is crucial to an improved NEPA process. To that end, CEQ will draft regulations that require agencies to periodically consult in a formal sense with interested parties throughout the NEPA process.

BP Comment: We concur with this recommendation. In our comments to the Committee it was stated, "Because of the absence of interaction between stakeholders and the agency for extended periods, the NEPA analysis can be become severely out of date or not reflect the intentions of the stakeholders, especially a project proponent. Not only do economics change, but technological advancements are dynamic and may not be brought forward until the next public input scenario occurs, which will be when the public review of the draft document occurs. When the draft document becomes out of date or is not current with the best information available, it must be reworked, supplemented, or in some cases, started over. This isolation of stakeholders also increases the volume of public comments during the draft review which adds more time to generating a Final EIS since those comments must be responded to as part of the process". If this provision can be adopted, it should allow for a constructive dialogue with the agencies and a more accurate and timely completion of written analysis.

Recommendation 6.2: Amend NEPA to codify CEQ regulation 1501.5 regarding lead agencies. In regulation, the lead agency is given certain authorities. Legislation such as SAFE TEA-LU and the Energy Policy Act of 2005 have spoken to the need for lead agencies in specific instances such as transportation construction or natural gas pipelines. In order to reap the maximum benefit of lead agencies, their authorities should be applied "horizontally" to cover all cases. To accomplish this, appropriate elements of 40 CFR 1501.5 would be codified in statute. Additional concepts would be added such as charging the lead agency with the responsibility to develop a consolidated record for the NEPA reviews, EIS development, and other NEPA decisions. This codification would have to ensure consistency with lead agency provisions in other laws.

BP Comment: Designating major decision points for the agency's principal programs that have a significant effect on the human environment, requiring the relevant environmental documents, comments and responses be part of the record in final rulemakings or adjudicatory proceedings, or requiring that relevant environmental documents, comments and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions, are among some of the requirements found in 40 CFR 1501.5. However, our experience indicates these provisions and others found in 40 CFR 1501.5 are being implemented by the agencies. Further, if any subsequent changes were warranted in this section of the CEQ regulations, it would be easier to make revisions in the regulations than through a statutory change. Consequently, we do not see

the advantage or need of incorporating these regulatory provisions into the statutory language of NEPA.

Group 7 - Additional Authority for the Council on Environmental Quality
Recommendation 7.1: Amend NEPA to create a "NEPA Ombudsman" within the Council on Environmental Quality. This recommendation would direct the Council on Environmental Quality to create a NEPA Ombudsman with decision making authority to resolve conflicts within the NEPA process. The purpose of this position would be to provide offset the pressures put on agencies by stakeholders and allow the agency to focus on consideration of environment impacts of the proposed action.
BP Comment: We support this recommendation provided that CEQ is adequately staffed to perform this function and has authority to implement solutions to the conflicts.

Recommendation 7.2: Direct CEQ to control NEPA related costs. In this provision CEQ would be charged with the obligation of assessing NEPA costs and bringing recommendations to Congress for some cost ceiling policies.
BP Comment: BP concurs with this recommendation.

Group 8 - Clarify meaning of "cumulative impacts"
Recommendation 8.1: Amend NEPA to clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts. A provision would be added to NEPA that would establish that an agency's assessment of existing environmental conditions will serve as the methodology to account for past actions.
BP Comment: The CEQ regulations at 40 CFR 1508.7 define "cumulative impacts." This definition clearly states that past actions are to be considered in assessing cumulative impacts. Further, the CEQ Regulations at 40 CFR 1502.15, "Affected Environment", define the components of this portion of a NEPA analysis. Combined together and based upon our observations, it is difficult to understand any further clarification being necessary to account for past actions in a NEPA analysis. Consequently, we do not believe this recommendation is warranted.

Recommendation 8.2: Direct CEQ to promulgate regulations to make clear which types of future actions are appropriate for consideration under the cumulative impact analysis. CEQ would be instructed to prepare regulations that would modify the existing language in 40 CFR 1508.7 to focus analysis of future impacts on concrete proposed actions rather than actions that are "reasonably foreseeable."
BP Comment: We support this recommendation in concept, but limiting an analysis to "concrete proposed actions" could limit the scope of a possible analysis and prevent proponents from being able to bring forward projects that are still in a preliminary planning stage but are prospective. Instead, criteria should be used that include actions that are "reasonably foreseeable and do not rely on speculative scenarios."

Group 9 – Studies

Recommendation 9.1**:** CEQ study of NEPA's interaction with other Federal environmental laws. Within 1 year of the publication of The Task Force final

recommendations, the CEQ will be directed to conduct a study and report to the House Committee on Resources that:
a. Evaluates how and whether NEPA and the body of environmental laws passed since its enactment interacts; and
b. Determines the amount of duplication and overlap in the environmental evaluation process, and if so, how to eliminate or minimize this duplication
BP Comment: We support these two recommendations.

Recommendation 9.2: CEQ Study of current Federal agency NEPA staffing issues. Within 1 year of the publication of The Task Force final recommendations, the CEQ (with necessary assistance and support from the Office of Management and Budget) will be directed to conduct a study and report to the House Committee on Resources that details the amount and experience of NEPA staff at key Federal agencies. The study will also recommend measures necessary to recruit and retain experienced staff.
BP Comment: We support the study of NEPA staffing issues for federal agencies.

Recommendation 9.3: CEQ study of NEPA's interaction with state "mini-NEPAs" and similar laws. Within 1 year of the publication of The Task Force final recommendations, the CEQ will be directed to conduct a study and report to the House Committee on Resources that at a minimum:
a. Evaluates how and whether NEPA and the body of state mini-NEPAs and similar environmental laws passed since NEPA's enactment interacts; and
b. Determines the amount of duplication and overlap in the environmental evaluation process, and if so, how to eliminate or minimize this duplication.
BP Comment: We support this recommendation.

Besides the comments provided above, BP would like to reiterate pertinent comments previously provided to the Committee but that were not included in your list of recommendations. These are:

- PROVIDE CONSISTENT PROCEDURES FOR THIRD PARTY CONTRACTORS: It is important to develop NEPA templates for third party contractors when preparing EAs and EISs. The use of third party contractors can be efficient and should save money and many hours of time for agency employees. Unfortunately, this process is being hindered by changes in format and content requirements -- not surprising considering the number of judicial and administrative reviews to which NEPA analyses can be subjected. The judicial and administrative reviews often lead to new policies for meeting NEPA requirements. If these new expectations are not clearly communicated to the third party contractor, the analysis can be embroiled in multiple re-revisions which are wasteful and costly. Agencies should develop templates for third party contractors showing what should be included in a NEPA analysis based upon the ongoing inevitability of judicial and administrative decisions and agency policies.
- INCONSISTENT NEPA STANDARDS: Inflated NEPA standards frequently occur when a project proponent is paying for a project-level NEPA analysis. A common practice when proposing a new project is to review and incorporate existing NEPA format and content that have been prepared by the agency. Many times the existing

documents can provide valuable insight into the expectations that must be met to prepare an acceptable NEPA analysis. However, it can be frustrating, particularly if the project proponent elects to use a third party contractor, to suddenly learn that the "bar has been raised" and the privately-funded analysis must meet significantly higher standards than is required of a publicly-funded analysis. BP is more than willing to fund the appropriate level of environmental analysis when a third party contractor option is exercised; however, the analysis and level of detail should be consistent with internal agency documentation and analyses that have previously been deemed acceptable.

In conclusion, thank you for allowing BP to testify as part of your field hearings and for considering our comments to the Committee's written recommendations. Should you have any questions regarding our comments, please do not hesitate to contact myself or Brian Miller of our Washington D.C. office at (202) 669-3801.

Sincerely,
Dave Brown

Cc: Mr. Brian Miller-BP Washington D.C.
Mr. Jack Rigg-BP Denver, CO
Mr. Jeff Conrad-BP Houston
Mr. Terry Adamson-BP Houston